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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID SALVATORE DIAZ, III and
RUSSELL TAYLOR OTT,

Defendants.

Case No. 4:17-cr-00533 EMC

**DEFENDANTS DAVID DIAZ AND
RUSSELL OTT'S STATUS REPORT
REGARDING EVIDENCE VIEWING,
SEARCHES DISCOVERY AND
ELECTRONIC DISCOVERY**

**Date: February 13, 2019
Time: 2:30 P.M.**

Judge: Hon. Edward M. Chen

I. INTRODUCTION

A further status conference is scheduled for February 13, 2019 before this Court. Counsel for David Diaz, III and Russell Ott hereby provide this report regarding the status of the evidence viewing, searches discovery, and electronic discovery matters.

II. EVIDENCE VIEWING

Mr. Diaz first requested the opportunity to view the evidence in this case by letter to the government on August 7, 2018. To date, still no viewing times have been scheduled. Mr. Diaz has advised the Court of the lack of progress in this endeavor over the past several months. See Docs #431, #485 and #512.

Contrary to the government's status statement, the government has not provided any dates to defense counsel and counsel are unaware of the government having "struggled to find dates and times that work for all the parties." Government Status Report at 4, Doc #551. The only dates that have been proposed to view the evidence are the dates provided by the defense.

Most recently, after numerous meet and confer sessions with government's counsel, and at their request, the defense provided proposed viewing dates on January 7, 2019. The dates ran through February 4, 2019. The government did not respond to the defense proposed dates until the last date defense counsel proposed to view the evidence (February 4, 2019). The government's late response wasted considerable efforts by the defense in preparing the proposed schedule after coordinating the schedules of the 14 defense lawyers in the case.

The defense questions why it is now going to take the government until "the end of February . . . to provide proposed dates" to defense counsel. Government Status Report at 4, Doc #551. This matter has been pending far too long to wait an additional two-weeks.

In any event, defense counsel require a number of proposed viewing dates in March and April that are at least 4 weeks out so that counsel can arrange their schedules and coordinate with their respective investigators and expert witnesses. Scheduling is

1 complicated by the fact that two of the lawyers will be traveling from Los Angeles and
2 one will be traveling from Boston, Massachusetts.

3 **III. SEARCHES DISCOVERY**

4 After a lengthy waiting period, on January 10, 2019, the government provided
5 counsel with an updated proposed attorney's-eyes-only protective order. Defense counsel
6 promptly agreed to the protective order and it was filed at that time. Doc #514. That
7 same day, the Court issued the protective order. Doc #517.

8 Pursuant to the Court's December 19 and 20, 2018 discovery orders, the
9 government was ordered to provide less-redacted and the omitted pages searches
10 discovery no later than two weeks after the attorney's-eyes-only protective order was
11 filed. Doc #502. The order was filed on January 10, 2019. The searches discovery was
12 made due no later than January 24, 2019.

13 On January 24, 2019, defense counsel did not receive any less-redacted searches
14 discovery, any omitted pages of the searches discovery, or an explanation regarding any
15 omitted pages that the government did not have in its possession.

16 On January 26, 2019, counsel for Mr. Diaz filed a motion for sanctions against the
17 government for failing to provide the searches discovery as ordered by the Court. Doc
18 #537. The government's opposition to the motion was due on February 3, 2019 and Mr.
19 Diaz's reply was due on February 7, 2019.

20 On February 1, 2019, counsel for the government informed counsel for Mr. Diaz
21 that the "unredacted and lesser redacted affidavits [were] being processed." AUSA Email
22 (2/1/2019). That day, the government provided one search warrant affidavit pursuant to
23 the attorney's-eyes-only protective order. That same day, counsel for Mr. Diaz shared the
24 search warrant affidavit with all defense counsel (save Michael Clough) and informed
25 them that the government had said that the unredacted and lesser redacted affidavits were
26 being processed.

27 On February 3, 2019, the government did not file an opposition to the motion for
28 sanctions.

1 On February 7, 2019, the government provided a portion of the unredacted and
2 lesser redacted searches discovery to the defense. That same day, the government filed an
3 untimely response to the motion for sanctions and a status report, which purported to
4 address the searches discovery. Doc #550 and #551; Northern District Criminal Law
5 Rule 47-2(d).

6 In the status report, the government proclaimed that it had “provided less redacted
7 versions of 369 pages of search warrants, which defendants identified as those that they
8 had standing to object to in the form of a motion to suppress.” Doc #551 at 3-4. At first
9 glance, this volume of material may cause one to be impressed with the production. In
10 the end, the impressive nature of the production quickly fades.

11 Mr. Diaz had only requested 71 pages of unredacted discovery as identified in
12 Discovery Letter #6. So the production of an extra 299 pages of discovery was
13 duplicative and unnecessary. The government re-produced the complete affidavits with
14 new bates numbers although only a few pages of each affidavit had been redacted. The
15 government only provided 33 of the 71 pages requested.¹

16 The government did not produce 38 of the 71 pages of redacted discovery. The 38
17 pages relate to 19 separate searches. See Discovery Letter #6, Searches #5, #7, #15, #16,
18 #24, #28, #30, #31, #32, #33, #34, #36, #39, #40, #41, #43, #44, #45 and #50.

19 The government did not provide any omitted pages of the searches discovery, or an
20 explanation regarding any omitted pages that the government did not have in its
21 possession. See December 19 and 20, 2018 Discovery Orders, Docs #502 and #506. This
22 omitted discovery relates to 50 separate searches. See Discovery Letter, Searches #1, #2,
23 #3, #4, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16, #17, #18, #19, #20, #24, #25,

24
25
26 ¹ The 33 pages produced relate to 41 searches. See Discovery Letter #6, Searches
27 #6, #21, #22, #23, #25, #26, #27, #29, #30, #31, #32, #33, #34, #35, #36, #37, #38, #39,
28 #40, #41, #42, #43, #44, #45, #53, #56, #57, #58, #59, #60, #61, #62, #63, #64, #65, #66,
#67, #68, #69, #71 and #72.

#26, #29, #30, #31, #32, #33, #34, #35, #36, #37, #38, #39, #40, #41, #42, #43, #44, #45, #46, #47, #48, #49, #52, #53, #54, #55, #70, #73, and #74.

The Court's December 19 and 20, 2018 Discovery Orders did not limit the government to only providing searches discovery regarding the searches that the "defendants preliminarily claim[ed] standing." Doc #509 (Notice). The Court's order states "the government will provide the less-redacted materials referenced in the defendants' discovery letter 6 and the omitted pages in discovery letter 7." Doc #502 at 1. As defense counsel noted in the notice of standing: "When the defense receives the less redacted discovery and missing pages of discovery as detailed in Defendant David Diaz's Discovery Letters #6 and #7 and as ordered by this Court, defendants will modify this standing notice accordingly." Id.

The government provided counsel with searches discovery that was previously produced in unredacted form. The duplicative discovery has been produced under the attorney's-eyes-only protective order. Counsel do not know if the government will claim that this previously unprotected discovery now falls within the attorney's-eyes-only protective order.

In sum, the government has not fully complied with this Court's orders. The government has not provided: (1) 38 pages of the less-redacted discovery for 19 searches; (2) the omitted pages of discovery for 50 searches; (3) or an explanation regarding any omitted pages that the government does not have in its possession (unknown number of pages; 50 searches).

IV. ELECTRONIC DISCOVERY INDEX

Right at the Court imposed deadline, on January 30 and 31, 2019, the government turned over forensic data from a total of 115 electronic devices by providing the defense discovery coordinator with a series of hard drives. On January 31, the government also turned over a list of electronic evidence seized, setting out the 115 devices for which forensic data was being turned over, and then highlighting an additional 29 devices that the government intended to produce that had been seized from various locations.

1 The defense discovery coordinator has conducted a preliminary review of the
2 forensic data from the 115 devices, consisting of multiple terabytes of data. Of the 115
3 devices, forensic data from 13 of them (12 phones and an iPad) are in a searchable
4 format. Data from one additional phone was produced via a disc that the discovery
5 coordinator has been unable to access or read.

6 The remaining 101 devices have been presented to the defense as “image” files
7 created by the government’s forensic software, that are not searchable and not currently
8 accessible or readable. Examples of these imaged devices are laptop and desk top
9 computers, external hard drives, thumb drives, cameras, and SD cards. These 101
10 “image” files will require a forensic expert and special software in order for the defense
11 to actually view their contents.

12 In short, the government has turned over 101 devices imaged by its proprietary
13 software such that the data for these devices is not readily accessible to the defense. Over
14 85% (101/115 devices) of the material from the devices will require an expert to make it
15 accessible and searchable. The government took over 14 months to turn over the vast
16 bulk of this electronic device material, and it is presently unclear how long it will take to
17 get the 85% of the devices in a usable format. The defense is reaching out to experts with
18 experience as to these “image” files to provide the Court with more information by the
19 February 13 court date.

20 As to the 29 devices that the government specifically indicated on January 31 that
21 it intended to produce in the future, as promised, the defense met its deadline of
22 prioritizing the production of those devices by February 5, 2019. The government was
23 given a prioritized list of the six locations from which those devices were seized. The 29
24 devices listed by the government in this “to be produced” category consist of multiple cell
25 phones, an iPad, thumb drives, and cameras. The defense does not know when the native
26 data from those devices will actually be produced, or whether it will be produced in a
27 readable format for the defense, or whether it will be produced as the previously
28 discussed forensic “image” files. Further complicating the entire process is the lack of

1 clarity as to whether various devices seized by the government can actually be decrypted
2 and, if so, when they will be decrypted.

3 The meaningful production or understandable formatting of these electronic
4 devices is going to take at least several more months. Then, it will take additional time to
5 actually go through the terabytes of material and discern the relevant material and then
6 conduct any necessary investigation of that material. So, while a modicum of progress
7 has been made, very little forward movement has occurred.

8 DATED: February 10, 2019

Respectfully submitted,

9 */s/ James Thomson*

10 JAMES THOMSON
Attorney for David Diaz, III

12 */s/ Robert Waggener*

13 */s/ Marcia Morrissey*

14 ROBERT WAGGENER
15 MARCIA MORRISSEY
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